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In The

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF NEW YORK,

Petitioner,

against

RONALD ONOFRE,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the holding of the New York State Court of Appeals that the statute proscribing CONSENSUAL SODOMY (New York Penal Law §130.38) specifically violates the equal protection clause of the United States Constitution, as well as respondent's constitutional right to privacy (i.e., his freedom of personal conduct), justify this Court's review on writ of certiorari?

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OPINIONS BELOW

The Onondaga County Court's Memorandum Decision, dated September 1, 1978, which upheld the constitutionality of the statute in question has not been published (Appendix A). The New York State Supreme Court, Appellate Division, Fourth Department, reversed petitioner's judgment of conviction on January 24, 1980 (72 A.D.2d 268) (Appendix B). The New York State Court of Appeals affirmed the order of the Appellate Division on December 18, 1980, holding that the statute specifically violated respondent's rights as protected by the United States Constitution (51 N.Y.2d 476) (Appendix C).*

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*The instant action was consolidated before the New York State Court of Appeals with *People of the State of New York* v. *Peoples and Goss* and *People of the State of New York* v. *Sweat*. It is requested that this Court consolidate the instant petition with that filed by the District Attorney of Erie County in those two actions.

JURISDICTION

Petitioner seeks a writ of certiorari to the New York State Court of Appeals with regard to its decision of December 18, 1980, affirming the order of the New York State Supreme Court, Appellate Division, Fourth Department.

The writ of certiorari is sought, pursuant to Title 28 U.S.C. §1257(3), because the Court of Appeals held that the state statute in question specifically violated the equal protection clause of the United States Constitution and respondent's constitutional right of privacy.

CONSTITUTIONAL PROVISION

UNITED STATES CONSTITUTION
(Amendment XIV, §1)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

NEW YORK PENAL LAW §130.00(2)
(Sex Offenses; definitions of terms):

> 2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.
>
> L. 1965, c. 1030

NEW YORK PENAL LAW §130.38
(Consensual Sodomy):

> A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.
>
> Consensual sodomy is a class B misdemeanor.
>
> Added L. 1965, c. 1038 §2.

STATEMENT OF THE CASE

Respondent was indicted on April 29, 1977, for SODOMY IN THE FIRST DEGREE, SEXUAL ABUSE IN THE FIRST DEGREE, CONSENSUAL SODOMY and SEXUAL ABUSE IN THE THIRD DEGREE.

On October 4, 1978, the charges of SODOMY IN THE FIRST DEGREE, SEXUAL ABUSE IN THE FIRST DEGREE, and SEXUAL ABUSE IN THE THIRD DEGREE were dismissed by the Onondaga County Court, the victim having indicated that he had willingly engaged in oral and anal sexual contact with respondent. Respondent's motion to dismiss the charge of CONSENSUAL SODOMY, on the ground that New York Penal Law §130.38 violated the equal protection provisions of the state and federal constitutions, as well as his right to privacy, was denied (see Appendix A).

The Attorney General of New York State had been notified of the proceedings pursuant to Executive Law §71, but he indicated that he would rely on petitioner herein throughout the entire proceedings.

On October 18, 1978, the date of the crime charged in the indictment was amended, respondent admitted committing CONSENSUAL SODOMY, and he was sentenced to serve a one-year conditional discharge.

On October 28, 1978, respondent filed a notice of appeal and on his direct appeal challenged his judgment of conviction on the grounds that New York Penal Law §130.38 violated the First Amendment of the United States Constitution, as well as his constitutional rights to privacy, due process and equal protection. By order entered on January 24, 1980, the New York State Supreme Court, Appellate Division, Fourth Department, reversed respondent's judgment of conviction and dismissed the indictment (72 A.D.2d 268) (Appendix B).

On March 13, 1980, Associate Judge Domenick L. Gabrielli of the New York State Court of Appeals granted petitioner leave to appeal (49 N.Y.2d 895). On December 18, 1980, over the dissent of two judges, that court affirmed the decision of the Appellate Division specifically because the statute violated respondent's right to privacy and equal protection as guaranteed by the United States Constitution (51 N.Y.2d 476) (Appendix C).

By order entered February 10, 1981, the Court of Appeals denied respondent's motion for reargument (____ N.Y.2d ____) (Appendix E).

FACTS

On February 23, 1977, respondent was arrested and charged with SODOMY IN THE FIRST DEGREE, pursuant to a felony complaint alleging that he had forcibly engaged in deviate sexual intercourse with one Russell Evans (12-14).* As a result of the anal intercourse, Evans, a 17-year-old retarded youth, was forced to seek medical attention (13-15, 59-65).

Respondent claimed to have met Evans as a result of his activities as a purported "minister" of the "Universal Life Church," and that all of their acts together were the result of their mutual love for each other (15-33).

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*Page references are to the Record on Appeal in the New York State Court of Appeals.

Respondent was subsequently indicted (34-35). However, when Evans indicated that his participation in the activities in question was voluntary, as illustrated in certain photographs supplied by the respondent, the Onondaga County Court dismissed all charges except that of CONSENSUAL SODOMY (48-65).

Respondent later admitted committing CONSENSUAL SODOMY and was sentenced to serve a one-year conditional discharge (66-71).

ARGUMENT

POINT I

The writ of certiorari should be granted due to the federal constitutional significance of the Court of Appeals' decision.

Although a writ of certiorari is not a matter of right, it is respectfully submitted that the validity of New York Penal Law §130.38 under the United States Constitution is an issue of "special and important" significance which warrants this Court's review (Rule 17, Rules of the Supreme Court). Indeed, a decision by the New York State Court of Appeals that the statute in question specifically violates *only* the federal constitution is clearly a matter for this Court's attention and is of considerable importance to the general public, as distinguished from the individual parties involved (see *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The federal constitutional questions at issue herein, and the sharp division among the state courts as to the validity of similar statutes proscribing consensual sodomy, clearly demonstrate the need for this Court's guidance on the subject (see *Commonwealth* v. *Bonadio*, ____ Pa. ____, 415 A2d 47 (1980); *State* v. *Hill*, 166 N.J. Super. 224, ____ (Law Div.), 399 A.2d 667, 671-672 (1978), rev'd on other gnds. 170 N.J. Super. 485 (App.

Div.), 406 A.2d 1334 (1979); *State* v. *Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *State* v. *Pilcher*, 242 N.W.2d 348 (Iowa, 1976); compare *Kelly* v. *State*, 45 Md. App. 212, ____, 412 A.2d 1274, 1277 (1980); *Doe* v. *Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901, reh. den. 425 U.S. 985 (1976); *State* v. *Enslin*, 25 N.C. App. 662, 214 S.E.2d 318 (1975), cert. den. 425 U.S. 903, reh. den. 425 U.S. 985 (1976); *Canfield* v. *State*, 506 P.2d 987 (Okl. Crim.), app. dism. 414 U.S. 991 (1973), reh. den. 414 U.S. 1138 (1974); see also *State* v. *Callaway*, 25 Ariz. App. 267, 542 P.2d 1147 (1975), rev'd sub nom. *State* v. *Bateman*, 113 Ariz. 107, 547 P.2d 6 (en banc), cert. den. 429 U.S. 864 (1976); *State* v. *Elliott*, 88 N.M. 187 (Ct. App.), 539 P.2d 207 (1975), rev'd 89 N.M. 305, 551 P.2d 1352 (1976).

Furthermore, statutes proscribing consensual sodomy have been enacted by a substantial number of state legislatures (see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799, 949-950). The uneven treatment which such statutes have received in the state courts can only serve to encourage constitutional attack, resulting in inconsistent interpretations of such statutes under the United States Constitution until this Court finally decides the matter.

In *Doe* (425 U.S. at 901) this Court summarily affirmed a lower court decision upholding the constitutionality of a statute similar to that at issue in the case at bar. However, three members of the Court would have noted probable jurisdiction and would have set the case for oral argument (425 U.S. at 901). It is respectfully submitted that the increasing need for this Court's guidance in this area continues unabated.

Hence, petitioner seeks this Court's review on writ of certiorari.

. . . as to the right of privacy

This Court has long recognized that there are certain decisions which are personal and which an individual must be permitted to make without unjustified governmental intrusion (see *Carey* v. *Population Services International*, 431 U.S. 678, 684-685 (1977) [contraception]; *Roe* v. *Wade*, 410 U.S. 113, 152 (1973) [abortion]; *Eisenstadt* v. *Baird*, 405 U.S. 438, 453-454 (1972) [contraception]; *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) [marriage]; *Griswold* v. *Connecticut*, 381 U.S. 479, 485-486 (1965) [contraception]). The freedom to make such decisions is expressed as the "right to privacy", and transcends the notion that "privacy" refers only to the ability to act behind closed doors (*Lovisi* v. *Slayton*, 363 F.Supp. 620, 625-626 (E.D. Va. 1973), aff'd on other gnds 539 F.2d 349 (4th Cir.), cert. den. sub. nom. *Lovisi* v. *Zahradnick*, 429 U.S. 977 (1976)).

In *Griswold (supra)* this Court looked to the "penumbras" of the specific guarantees of the Bill of Rights to create a "zone of privacy" that extended to protect from governmental interference the marital relationship and the personal decision of contraception.

This right of personal choice in matters of contraception was expanded beyond the marital relationship in *Eisenstadt* (*supra*) and, most recently, in *Carey* (*supra*). In *Roe* (*supra* at 153) this Court held that the right to privacy also protected "a woman's decision whether or not to terminate her pregnancy." The right to privacy, as this Court pointed out in *Carey* (*supra* at 685), has been further held to shield personal decisions relating to marriage (*Loving*, *supra*); procreation (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-542 (1942)); family relationships (*Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944)); and child rearing and education (*Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)).

It is respectfully submitted, however, that this Court has never extended the right to privacy to embrace acts of consensual sodomy, even within the privacy of the home, and has gone so far as to let stand the validity of a state statute prohibiting private acts of consensual sodomy (*Doe, supra*). Contrary to the interpretation given to it by the New York Court of Appeals (51 N.Y.2d at 493; Appendix C, A36-A37), the District Court in *Doe* would appear to have based its decision solely upon the constitutionality of the statute in question, rather than on any issue of standing or lack of justiciable controversy (see Appellant's Jurisdictional Statement in *Doe*, pp. 6-11).

Respondent's activities in the case at bar, made even more reprehensible by the mental deficiencies of the complainant (13-15), fell squarely within the provisions of New York Penal Law §130.38. Such actions cannot be said to be protected by a right to privacy which has heretofore been granted only to matters of marital intimacy, procreative choice and familial decisions, rather than solely to sexual gratification.

> The privacy right . . . cannot be said to be absolute. In fact, it is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind . . . (*Roe, supra* at 154).

The New York State Court of Appeals' reliance (51 N.Y.2d at 487; Appendix C, A29-A30) on this Court's opinion in *Stanley* v. *Georgia* (394 U.S. 557 (1969)) as expanding the right to privacy to include private acts of consensual sodomy is inapposite. *Stanley* (*supra* at 564) involved more than mere private acts committed within the confines of one's home: the invasion in *Stanley* implicated not only the right to privacy, but more importantly, it violated fundamental First Amendment rights long cherished by the Court and not at issue in the case at bar. "Our holding in the present case turns upon the Georgia statute's infringement of

fundamental liberties protected by the First and Fourteenth Amendments" (*Stanley, supra* at 568 n.11).

The absence of such countervailing First Amendment considerations is conspicuous in the case at bar, and the activities herein are clearly outside of the protection of the constitutional right to privacy established by this Court. Although the outer limits of that right have not been enunciated by the Court, "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices" (*Carey, supra* at 684-685; see also *State* v. *Santos*, ____ R.I. ____, 413 A.2d 58, 67-68 (1980)). Indeed, this Court has expressly refused to extend the right of privacy to private consensual sexual behavior among adults (*Carey, supra* at 688 n.5), and has let stand the constitutionality of a Virginia statute proscribing consensual sodomy by its summary affirmance in *Doe* (*supra*).

Furthermore, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy" (*Roe, supra* at 152, quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)). Sodomy is a crime of "ancient vintage," prohibited as far back as biblical times (*Kelly, supra* at 1277; see also *Doe, supra* at 1202-1203; Comment, *The Constitutionality of Sodomy Statutes*, 45 Fordham L.R. 553, 578), and it is difficult to believe "that the decision of an unmarried adult to engage in private consensual sexual activities is of such a fundamental nature or is so 'implicit in the concept of ordered liberty' to warrant its inclusion in the guarantee of personal privacy [citations omitted]" (*Santos, supra* at 68; see also *Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49, 65-66, reh. den. 414 U.S. 881 (1973), 419 U.S. 887 (1974); *J.B.K., Inc.* v. *Caron*, 600 F.2d 710 (8th Cir. 1979); *Lovisi* v. *Slayton*, 539 F.2d 349, 351; *cf.*, 51 N.Y.2d at 486-489; Appendix C, A29-A32). It is respectfully submitted that the decision to commit sodomy cannot be elevated to the level of those decisions involving procreative choice, marriage, family

choice, and education, and cannot realistically lay claim to constitutional protection any more than can decisions to commit adultery (New York Penal Law §255.17), incest (New York Penal Law §255.25), or bigamy (New York Penal Law §255.15).

Furthermore, respondent's claim that his activities with the complainant were cloaked with the right to privacy overlooks the fact that respondent removed his actions from the realm of private consensual conduct by photographing his activities and by removing those photographs from his home (59-65) (*Lovisi, supra*).

It is respectfully submitted that the New York Court of Appeals failed to adequately consider the implications of these photographs (see 51 N.Y.2d at 485 n.2; Appendix C, A27 n.2). Once respondent caused them to be removed from the privacy of his home, his acts may no longer be said to have been private; and that privacy is essential to respondent's constitutional claim (see *Lovisi*, 363 F.Supp. 620, 626). Indeed, can it seriously be contended that the use of contraceptives in *Griswold* (*supra*) would be similarly protected if such "use" should occur in Times Square rather than in the "sacred precincts of the marital bedroom"? (*Id.* at 485). Acts of a private nature which are made public relinquish any claim that they might have had to the right of privacy (see *Lovisi, supra; Raphael* v. *Hogan*, 305 F.Supp. 749, 755 n.18 (S.D.N.Y. 1969)).

In *Lovisi* (363 F.Supp. 620, 623), the defendants also took photographs of themselves engaging in acts of sodomy. The District Court specifically held that the Lovisis waived their right to privacy by taking photographs of their activities, and then, as in the case at bar (59-65), by failing to deny access to those photographs to other persons who had not participated therein. "In order for their sexual relations to be constitutionally protected, the Lovisis had the responsibility of ensuring that the seclusion surrounding their acts was preserved" (363 F.Supp. at 627; see 539 F.2d 349, 352 (Addendum)). The mere photographing of those acts and their availability to a non-participant, even

within the home was sufficient to relinquish any claim to privacy, despite the fact that the photographs which were initially made public did not even involve sodomy (363 F.Supp. 620, 623, 627).

In the case at bar, defense counsel repeatedly emphasized the existence of the photographs, one of which depicted an act of oral sodomy and which respondent freely removed from his home and volunteered for inspection by the People, to support the claim that the activities were consensual (59-65).

As such, it is respectfully submitted that respondent waived any claim that he might have asserted to the constitutional protection of the right to privacy. Furthermore, given the limits which this Court has placed on the extent of that right, such acts of sodomy may be clearly seen to be outside of its ambit. The case at bar does not deal with the marital right or any related right of procreation or family choice (see *Griswold, supra* at 486). Rather, it involves activities which have been traditionally antithetical to societal norms and which cannot be deemed "fundamental" by any stretch of the imagination. Such activities are clearly outside the scope of the constitutional right to privacy.

. . . as to equal protection

The instant statute (New York Penal Law §130.38) discriminates between married and unmarried individuals on its face. However, in order to uphold its validity only a rational basis need be shown for the exclusion of married persons from its prohibition (see *Reed* v. *Reed*, 404 U.S. 71, 76 (1971)).

This Court has established that a statute will be strictly scrutinized only if it involves one of the narrowly-defined suspect classifications (see *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (1973)), or when it infringes upon a fundamental right (*San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16-17, reh. den. 411 U.S. 959 (1973)).

Suspect classifications have been based on race (*Loving, supra* at 10-11), alienage (*Graham* v. *Richardson*, 403 U.S. 365, 371-372 (1971)), nationality (*Graham, supra* at 372; *Oyama* v. *California*, 332 U.S. 633, 644-646 (1948)), and sex (*Frontiero, supra*). However, "this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways [citations omitted]" (*Reed, supra* at 75). Since unmarried individuals do not form a suspect classification, and since, as has been shown (*supra*), no fundamental right is restricted by the instant statute, the differentiation within the statute need only be rationally related to a justifiable legislative aim (*Reed, supra* at 76).

Contrary to the holding of the Court of Appeals (51 N.Y.2d at 489-491; Appendix C, A31-A34), there has been clear evidence of physical harm resulting from penetration of the anus with the penis, an act of sodomy to which respondent admitted and which in fact caused the victim to seek medical attention for his injuries (13, 59-65). Such activity may result in an anal ulcer or fissure, as well as "extensive changes in the anus and rectum both by friction and as a result of infection" since the anal canal was not evolved for such activity (Marino & Mancini, *Anal Eroticism*, Surg. Clin. No. Am., Vol. 58, No. 3 (June, 1978); Davis, *Self Inflicted Injuries of the Anus, Rectum and Perineum*, Am. J. Proct., Vol. 20, No. 3 (June, 1969); see also Sohn, Weinstein & Gonchar, *Social Injuries of the Rectum*, Am. J. Surg., Vol. 134 (November, 1977)).

Indeed, another of respondent's activities, fellatio, has also been known to cause injury (Worsaae & Wanscher, *Report of a Case*, Acta Dermatovener (Stockholm), Vol 58 (1978)). Clearly, such injuries, or even their potential, are substantial enough to justify the regulation imposed by the instant statute.

In exempting married persons from its operation, however, the New York Legislature was cognizant of the fundamental rights of marital privacy enunciated by this Court in *Griswold* (*supra*), and the statute was carefully worded in order that such rights

would not be violated. The statute does not differentiate between married and unmarried persons because the latter are more susceptible to harm from such activities. Rather, it bends in the face of the clear right to marital privacy, differentiating on the basis of the varying privacy interests in the relationships of married and unmarried persons, and protecting the "sacred precincts of the marital bedrooms" from governmental intrusion (*Griswold, supra* at 485-486).

Moreover, "[a]s Mr. Chief Justice Warren stated, there is a 'right of the Nation and of the States to maintain a decent society" (*Paris Adult Theatre I, supra* at 59-60, quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 199 (1964); see also *The Constitutionality of Sodomy Statutes, supra* at 581).

The New York Legislature has chosen to adopt its statute proscribing consensual sodomy. It was a moral judgment "based largely upon the premise that deletion thereof might ostensibly be construed as legislative approval of deviate conduct" (51 N.Y.2d at 489, quoting N.Y. Legis. Annual, pp. 51-52 (1965); Appendix C, A32). Indeed, the New York State Legislature has consistently rejected efforts to repeal its consensual sodomy statute (See, e.g., A.3647 N.Y. Legis. Record and Index (1981); S.4672, S.994, S.956, A.1201 N.Y. Legis. Record and Index (1980); S.2078, A.1659 N.Y. Legis. Record and Index (1979); see also N.Y. Legis. Annual, pp. 530-531 (Governor's Memoranda) (1965)).

Such a statute is clearly perceived to be conducive to a "decent society," and even if "less drastic" measures to achieve the legislative aims are available, they are not mandated. "Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative" (*San Antonio Independent School District, supra* at 51).

Although there may be little empirical evidence as to antisocial behavior or moral decay fostered by such a statute, the

New York Legislature could quite reasonably have determined that such a connection does or might exist (see *Paris Adult Theatre I, supra* at 60-61). "It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself" (*Id.* at 60; see also *Doe, supra* at 1202).

Thus, it is respectfully submitted that the differentiation within New York Penal Law §130.38 is a rationally based distinction which satisfies the requirements of the Equal Protection Clause. Since the constitutional right of privacy is not implicated in the New York Penal Law's proscription of consensual sodomy, and since no other fundamental right or suspect classification is involved, such a rational basis is sufficient to support the statute against constitutional attack.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

RICHARD A. HENNESSY, JR.
District Attorney
Onondaga County Civic Center
Syracuse, New York York 13202

JOHN A. CIRANDO, ESQ.
Chief Assistant District Attorney
of Counsel

DATED: March 23, 1981

Appendices

APPENDIX A
MEMORANDUM DECISION OF ONONDAGA COUNTY COURT

STATE OF NEW YORK
COUNTY COURT COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK

vs.

RONALD ONOFRE

Indictment No. 77-181-1

APPEARANCES:

RICHARD A. HENNESSY, JR., ESQ., District Attorney of Onondaga County; DOREEN A. SIMMONS, ESQ., of Counsel, Attorney for the People

BONNIE STRUNK, ESQ., Attorney for the Defendant

GALE, J.

MEMORANDUM/DECISION

The above-named defendant has been charged, by Indictment No. 77-181-1, with SODOMY IN THE FIRST DEGREE, SEXUAL ABUSE IN THE FIRST DEGREE, CONSENSUAL SODOMY, and SEXUAL ABUSE IN THE THIRD DEGREE.

Subsequent to the arrest and indictment of the defendant, the victim recanted his statement as to the forcible nature of the sexual acts involved herein and acknowledged that all of the sexual relations upon which this Indictment was predicated were, in fact, voluntary. In light of this recantation, the People have indicated that the First, Second, and Fourth Counts of this Indictment should be dismissed. The Court agrees and the charges of SODOMY IN THE FIRST DEGREE, SEXUAL

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ABUSE IN THE FIRST DEGREE and SEXUAL ABUSE IN THE THIRD DEGREE are hereby dismissed.

The defendant moved to have the Third Count of this Indictment by which he is charged with CONSENSUAL SODOMY, in violation of the Penal Law §130.38, dismissed on the ground that the aforementioned statute is unconstitutional, both on its face and as applied in this case.

The defendant's argument is two-fold: he argues, first, that the statute is unconstitutional in that it violates the equal protection provisions of the State and Federal Constitutions and; second, that the statute as applied in this case is an unconstitutional infringement of his right to privacy.

It is the position of the People that Penal Law §130.38 is constitutional as a proper exercise of the State's power to promote the health, safety, general welfare, and morals of its inhabitants based on the Legislature's reasonable conclusion that acts of sodomy are both a moral outrage and a menace to the health and safety of society.

Pursuant to Executive Law §71, the Court ordered the defendant to serve notice of his motion on the Attorney General of the State of New York. Such notice was given and the Attorney General has notified the Court that he will not appear in this proceeding.

Penal Law §130.38 provides that:

> "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person."
>
> "Deviate sexual intercourse" is defined as:
>
> ". . . sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva."

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We are here dealing with the question of whether or not the consensual sodomy section, enumerated above, violates those Amendments of the United States Constitution by virtue of which an individual is deemed to have a right of privacy which serves as protection against all governmental invasions of the sanctity of a man's home and the privacies of life. Can the Constitution be interpreted to exclude so-called "unnatural" sex acts from any interference on the part of the State which concededly has the right and the obligation to protect the morals of its people?

A review of the few New York cases which have dealt with the issue presented herein shows a recent trend on the part of the courts towards holding Penal Law §130.38 unconstitutional as violative of equal protection or the right to privacy or some combination of the two.

The first reported case dealing with the constitutionality of the New York consensual sodomy law was *Caphart v. Hogan*, (305 F. Supp. 749,) SDNY decided in 1969. The case involved actors in a production of *Che!* arrested for committing sodomitic acts during the course of a performance. It was the defendant's position that the First Amendment protected acts of deviate sexual intercourse performed in public between unmarried consenting adults if such conduct was part of a dramatic work. The situation presented in the case at bar is clearly distinguishable because of the private nature of the sexual acts herein. The court disallowed the married/unmarried equal protection argument in noting that *all* public acts of sodomy, no matter by whom committed, would be criminal conduct in violation of the public lewdness law.

In the case of *In re Labady*, the court in its decision noted, in commenting upon the consensual sodomy statute:

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Memorandum Decision of Onondaga County Court

> "The statute does not specifically extend to consensual sodomy, performed in private. At common law, a lewd, obscene, or indecent act included only open or public behavior, Rittenour v. District of Columbia, 163 A 2d 558, 559 . . . Grisham v. State 10 Teen. (2 Yerger) 589, 594-597 (1831). We have found no prosecution for private homosexual acts under §130.38. One New York court has stated in dictum that the private conduct of an admitted homosexual was not violative of any criminal statute. In re Petition of Olga Schmidt, 56 Misc 2d 89, 92 . . . Many state statutes prohibiting homosexual conduct explicitly require openness or publicity.
>
> Note, Private Consensual Homosexual Behavior: The Crime and the Enforcement, 70 Yale L.J. 623, 635."

Many of the cases cited by the defense counsel indicate a growing propensity on the part of the United States Supreme Court to decriminalize "unnatural acts" and to reenforce and strengthen those Amendments of the Constitution granting the citizen his right to privacy.

For a Trial Court to attempt to analyze the thinking of the United States Supreme Court at any time in history is difficult. However, the actions of the present "Burger court" appear to strengthen the acts of the state. As the Wall Street Journal recently stated: (Wednesday, August 23, 1978, "A Judicial War on the Press?" by Jonathan Kwitny):

> "In recent months, the federal courts have ruled that the government may (a) examine the records of all telephone calls into and out of a newspaper office (or TV station, magazine or book publisher) without telling the newspaper; (b) obtain a secret search warrant to burst into newspaper offices, examining anything that looks interesting; and (c) throw a reporter into jail for failing to round up and turn over every note he ever wrote to himself, every scrap of paper that ever passed through his

> hands, and by implication every thought he ever had about a given subject."

In the cases of People v. Rice and Mehr, 80 Misc 2d 511, the District Court of Suffolk County in 1975 held Penal Law §130.38 unconstitutional as violative of the equal protection clauses of U.S. and N.Y. constitutions. Rice was charged with violating the consensual sodomy law in that he committed consensual sodomy in a public place. (With regard to Mehr, the information did not indicate where the acts complained of allegedly took place). The court questioned whether there was a reasonable basis for the distinction which makes certain conduct between unmarried consenting adults a criminal offense when married people are excluded from the prohibition as are unmarried people who engage in certain other types of sexual behavior. The court said:

> "The intent to be gleaned from the very words of the statute is the intent to prohibit unmarried persons, even though consenting, from engaging in some form of sexual conduct which has been termed sodomy. Married people are not prohibited from engaging in such conduct by the very definition, single or unmarried persons, who engage in sexual intercourse in the 'ordinary meaning' (Penal Law §130.00, subd. 1) are not committing a crime. What we are then faced with is a distinction, for which we can find no rational basis between married people, and unmarried who engage in sodomy and between unmarried people who engage in 'ordinary sexual intercourse' and those unmarried people who engage in 'deviate sexual intercourse' or sodomy, keeping in mind in all cases the parties are consenting."

The court went on to remark that it could not see what overriding or compelling state interest was protected by the consensual sodomy law:

> "We cannot see how the activities of two consenting adults threatens or causes any, nonetheless substantial,

> harm to either individual or public interests. Nor can we see any threat to public safety ... If acts of sodomy so outrage society that such acts should be criminalized then they should be so as to all who commit them. If sodomous acts have serious moral and health consequences so that they must be proscribed then they, again, should be so for all people, not just unmarried. The married adult, as well as the unmarried, has a right to be so protected. Or if the State's interest lies in protecting the morals of unmarried persons, then all sexual conduct between two unmarried persons should be prohibited not just sodomous conduct. If the real purpose is to prevent homosexuality, the legitimacy of such purpose not being here considered, then, the statute should proscribe conduct between unmarried persons of the same sex, not any such persons. Lastly, if the State's interest is to protect the public from sexual acts done in public then the statute should so state. Clearly none of these purposes is indicated. The statute seeks to prevent a certain group of people from doing certain acts and this court can find no basis for this classification, ..."

The court found also that the statute invades the right to privacy: "If, as has been held in *Griswold v. Connecticut*, 381 U.S. 479, inquiry into or regulations of a married person's sexual conduct is an invasion of the right to privacy, then inquiry into or regulation of a single person's sexual conduct is equally violative of the right to privacy."

The court's decision was reversed on appeal. (*People v. Rice & Mehr*, 87 Misc.2d 257, Supreme Court, Appellate Term 2 Dept. 1976. The appellate court preserved the *Griswold, supra*, emphasis on the marital relationship, noting that the New York statute built in the exceptions mandated by *Griswold, supra*, by excepting married couples entirely. The court pointed out that the defendant failed to cite a case which recognizes "... a fundamental right to commit consensual sodomy" and says that

Eisenstadt v. Baird (405 U.S. 438) "... does not require any extension of the right of privacy to unmarried couples regarding the issue of sodomy."

While the Court of Appeals affirmed the Appellate Term's reversal of the dismissal of the informations, it did so on the basis of their being an insufficient record on which to decide such an important constitutional question. (41 NY2d 1018)

The court stated:

> "In both of these cases novel and difficult constitutional questions in a field, largely unsettled, come to the court without a trial record and solely on the informations filed. Intermeshed are questions of conduct *traditionally treated as criminal and yet, when committed privately and circumspectly, suggestive of an unwarranted interference by the State with the lately recognized and inchoate 'penumbral' right of privacy* (see e.g. Griswold v. Connecticut, 381 US 479, 484-485; Stanley v. Georgia, 394 US 557, 564-568). The solution to these questions should not be determined in the bare outline of a criminal information, especially since divergencies of view, properly, may turn, among other things, on the different degrees of interference with privacy, or better, freedom of conduct, which may be tolerated in an organized society without infringing on a society's right to require conformance to standards which it believes essential to its survival or character." (Emphasis supplied)

Although the court upheld the informations, it was without prejudice to a review of the issues on the merits in the event of conviction. In light of the above, this case can hardly be regarded as a strong statement in support of the constitutionality of the consensual sodomy statute.

For the reasons indicated above we feel that the language of the Appellate Term in the cases of *People v. Rice & Mehr*

satisfies the requirements laid down initially by *Griswold, supra*, and the claim of unconstitutionality on the ground that it violates the equal protection provision of the State and Federal Constitutions is without merit.

A careful reading of the language of the Court of Appeals would indicate that the crux of the problem is whether or not consensual sodomy in the privacy of one's home infringes on society's right to require conformance to standards which it believes is essential to its survival or character.

This Court does not believe that it should usurp the function of the New York State Legislature. In the practice commentary to §130.38 we find the following language:

> "Each year since 1967, one or more bills have been introduced in the Legislature proposing repeal of this crime. As of 1974, these efforts have not been successful."

Presumably the same situation still continues or the Court would now be faced with this problem.

The latest word from the Courts of New York State is reflected in the Appellate Term decision and the Court of Appeals decision in the case of *People v. Mehr, supra.* There appears to this Court to be a thread running through their decisions to leave the consensual sodomy statute to Legislative action. The Appellate Term emphasized:

> "No case has been reported or cited by the defendant which would recognize a fundamental right to commit consensual sodomy."

This is different from the right to bear children. (*Eisenstadt* and *Griswold*, above).

While the Court of Appeals stressed the lack of a trial record; they also emphasized the difficulty of weighing freedom of individual conduct against the right of society to require con-

formance to standards which the State believes essential to its survival or character.

We feel that the State's right and power to regulate sexual conduct in order to promote the health, safety and morals of its people should be determined by their elected representatives. If the Court of Appeals had some temerity in deciding this issue, this Court is not about to embark on a determination of issues which it feels belongs to the people's representatives.

Today we live in a permissive society. If such a statute as §130.38 should be wiped off the books and consensual sodomy decriminalized, now is the time for the Legislature to do it.

For the reasons indicated this Court is not going to attempt to write legislation upon such a sensitive subject, but would rather leave it up to the Legislature where the solution to the problem really belongs. Under the circumstances, the defendant's motion is denied.

Submit Order in accordance with this Memorandum.

/s/ ORMAND N. GALE
County Court Judge

DATED: Syracuse, New York
September 1st, 1978.

[Reprinted from original without correction]

APPENDIX B
OPINION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RONALD ONOFRE, Appellant.

Fourth Department, January 24, 1980

SUMMARY

Appeal from a judgment of the Onondaga County Court (ORMAND N. GALE, J.), rendered October 18, 1978, convicting defendant, upon his plea of guilty, of consensual sodomy.

HEADNOTES

Crimes — Appeal

1. Defendant, who pleaded guilty to the crime of consensual sodomy in violation of section 130.38 of the Penal Law after the trial court denied his motion to dismiss the charge on the ground that the statute is unconstitutional on its face, can appeal that conviction by again challenging the constitutionality of the statute.

Crimes — Sodomy

2. Section 130.38 of the Penal Law is an unconstitutional exercise of State power insofar as it prohibits voluntary sexual conduct between consenting adults in private inasmuch as the State's interest in regulating such conduct is insufficient to prevent the statute from running afoul of the constitutional right to privacy, the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, and the due process clause of section 6 article I of the New York Constitution.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

CLS, Penal Law §130.38; CLS, NY Const Art I §6
70 AM JUR 2d, Sodomy §§2, 18, 26

APPENDIX B
Opinion of the New York State Supreme Court, Appellate Division, Fourth Department

ANNOTATION REFERENCE

Consent as defense in prosecution for sodomy. 58 ALR3d 636.

*By the Publisher's Editorial Staff.

APPEARANCES OF COUNSEL

Bonnie Strunk (Margot Karle of counsel), for appellant.

Richard A. Hennessy, Jr., District Attorney (Gail Uebelhoer of counsel), for respondent.

William H. Gardner, amicus curiae.

OPINION OF THE COURT

DOERR, J.

[1, 2] Defendant was charged with the crime of consensual sodomy in violation of section 130.38 of the Penal Law.* He moved to dismiss the charge, alleging that the statute is unconstitutional on its face. After a careful review of the law on the subject, County Court denied the motion and defendant entered a plea of guilty to consensual sodomy in violation of the statute. It is from this conviction that defendant appeals, again challenging the constitutionality of the statute. In this posture the case is properly before this court for review (see *People v Rice*, 41 NY2d 1018). We reverse.

There is no fact in dispute. Defendant by his own affidavit and his testimony before the Grand Jury, after waiving immunity,

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*Other charges of sodomy in the first degree (Penal Law, §130.50, subd 1), sexual abuse in the first degree (Penal Law, §130.65, subd 1), and sexual abuse in the third degree (Penal Law, §130.55) were dismissed when complainant recanted his Grand Jury testimony relating to forcible compulsion and lack of consent.

admitted engaging in the proscribed sexual conduct over a period of time with another male in the privacy of his home. The relationship, admitted by both participants, was entered into by mutual consent.

Section 130.38 of the Penal Law provides that "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." Deviate sexual intercourse is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva" (Penal Law, §130.00, subd 2). Thus, while the statute prohibits homosexual conduct, it also proscribes certain heterosexual conduct, but the latter is proscribed only between persons not married to each other. To that extent it is not the conduct which is condemned but rather the lack of jural relationship which the parties bear to each other.

The defendant argues that such penal prohibition is an improper exercise of governmental power, violative of his fundamental right to privacy, and that the due process clause requires strict judicial scrutiny of the governmental interest in such a statute. He further asserts that the distinction made in the statute between married and unmarried individuals is impermissible under the equal protection clause.

The People urge that we are bound by *Doe v Commonwealth's Attorney for City of Richmond* (403 F Supp 1199, affd without opn 425 US 901), which upheld the constitutionality of a Virginia penal law prohibiting consensual sodomy. That case, however, involved an action for a declaratory judgment and a permanent injunction from prosecution under the Virginia statute on the basis of possible police interference or enforcement. In the case at bar we have a defendant attacking the constitutionality of a

penal statute under which he stands convicted of a crime. Furthermore, in the light of *Cooper v Morin* (49 NY2d 69), *Doe v Commonwealth's Attorney (supra)* is not binding upon our court in any event. We therefore address the subject.

Prior to 1965, privacy was not regarded as an independent constitutional right but was rather an interest given limited protection by certain constitutional provisions, e.g., the Fourth and Fifth Amendments. In *Griswold v Connecticut* (381 US 479) the Supreme Court, based upon a "zone of privacy" relationship, struck down a statute forbidding the use of contraceptives by a married couple. The right of privacy was again recognized and extended in *Eisenstadt v Baird* (405 US 438), the court holding that if the distribution of contraceptives to married persons cannot be prohibited, a ban on their distribution to unmarried persons is equally impermissible. In doing so, it stated that, "If the right of privacy means anything, it is the right of the individual, *married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557 (1969). See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)." (*Eisenstadt v Baird, supra*, pp 453-454; emphasis added.) Subsequently this right of privacy was held to be a liberty guaranteed by due process of law in upholding the right of an unmarried woman to terminate her pregnancy (*Roe v Wade*, 410 US 113).

Thus it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fun-

damental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body (see, generally, Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L Rev 563). The right is broad enough to include sexual acts between nonmarried persons (see *Roe v Wade, supra; Eisenstadt v Baird, supra*) and intimate consensual homosexual conduct (see Tribe, American Constitutional Law, p 946).

It has been said that "privacy in the conventional sense (being left alone without anyone observing) is a generally accepted prerequisite to human sexual intercourse and the protection of sexual activity seems to be an important aspect of the constitutional right to privacy cases" (Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L Rev 1281, 1303). The right to be free from unwarranted governmental intrusions into one's privacy is fundamental (*Stanley v Georgia*, 394 US 557). The privacy right, however, is not absolute (*Roe v Wade*, 410 US 113, 154-155, *supra.*). To the extent that certain conduct has the potential for working harm, the State may restrict it.

What then is the State interest in regulating private, consensual sexual behavior between adults, and in particular, deviate sexual behavior in this context between homosexuals and unmarried heterosexuals? If the interest of the State is the general promotion of morality, we are then required to accept on faith the State's moral judgment. Equally important in the community of man would seem to be some degree of toleration of ideas and moral choices with which one disagrees. The State may have a paternalistic interest in protecting an individual from self-inflicted harm or self-degrading experiences. This again pre-

supposes the validity of the State's judgment, and outright proscription of certain activity can easily become discriminatory governmental tyranny. Curtailing activity which offends the public is a legitimate State interest but the standard to be applied in such a case is the effect that behavior might have on a reasonable person, not the most sensitive member of the community. Conduct which is carried on in an atmosphere of privacy between two parties by mutual agreement has little likelihood of offending a public not embarked on eavesdropping. A State interest based upon the prevention of physical violence and disorder fails for the same reason. Sexual conduct with an unwilling partner or one incapable of consent is punishable by other statutes.

Preserving marriage and the nuclear family is a legitimate State interest, as attested to by statutes which forbid adultery, even though it involves consensual acts between adults performed in private. There are those who argue that homosexual conduct should be forbidden even when conducted in private by consenting adults because it is destructive of traditional principles of family and marriage. However, there is no empirical evidence to support that view. In an era of ever expanding sexual freedom and rising divorce rates, there has been no indication that heterosexual marriage as an institution is generally less attractive. Divorced parties continue to remarry other partners. Further, there is no indication that the state of remaining unmarried has undermined the heterosexual family. Indeed, one legitimate form of being unmarried, religious celibacy, certainly not a concept of recent origin, has not made the heterosexual family less stable. "In general, there is surely no constitutional or moral duty to marry or, more generally, to procreate; such an idea violates everything that the consti-

tutional right to privacy was designed to protect, namely, autonomy in deciding whether and how to love" (Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L Rev 1281, 1344).

[2] None of the stated reasons suggested above rises to the level necessary to support the questioned legislation. Failing this, the statute runs afoul of the constitutional right to privacy and the Fourteenth Amendment's equal protection clause as well as that amendment's due process clause and in addition the due process clause of section 6 article I of the New York State Constitution. "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (*NAACP v Alabama*, 377 US 288, 307).

Moreover, if homosexual conduct is thus protected, heterosexual conduct between unmarried consenting adults in private is protected for the same reasons and in addition for the reason that the differentiation made between married and unmarried persons has no rational basis and is violative not only of due process but also the equal protection clause of the Constitution.

For these reasons, section 130.38 of the Penal Law is an unconstitutional exercise of State power insofar as it prohibits voluntary sexual conduct engaged in between consenting adults in private.

The defendant's conviction should, therefore, be reversed and the indictment dismissed.

CARDAMONE, SIMONS and WITMER, JJ., concur; DILLON, P.J., not participating.

Judgment reversed, on the law, and indictment dismissed.

[Reprinted from original without correction]

APPENDIX C
OPINION OF THE NEW YORK STATE COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. RONALD ONOFRE, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CONDE J. PEOPLES, III, and PHILIP S. GOSS, Appellants.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MARY SWEAT, Appellant.

Argued October 8, 1980; decided December 18, 1980

SUMMARY

Appeal, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 24, 1980, which (1) reversed, on the law, a judgment of the Onondaga County Court (Ormand N. Gale, J.), convicting defendant of consensual sodomy, and (2) dismissed the indictment.

Appeal, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Erie County Court (Penny M. Wolfgang, J.), entered October 9, 1979, which affirmed a judgment of the City Court of the City of Buffalo (Herbert R. Johnston, Jr., J.), rendered upon verdicts convicting defendants of consensual sodomy.

Appeal, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Erie County Court (Penny M. Wolfgang, J.), entered October 9, 1979, which affirmed a judgment of the City Court of the City of Buffalo (Carmelo A. Parlato, J.), convicting defendant of consensual sodomy.

Defendants were each convicted of consensual sodomy under section 130.38 of the Penal Law, defined as deviate sexual in-

tercourse between persons not married to each other (Penal Law, §130.00, subd 2). On appeal, the Appellate Division reversed in the case of defendant Onofre and dismissed the indictment, concluding that section 130.38 was unconstitutional, and the Erie County Court affirmed the convictions of defendants Peoples, Goss and Sweat, rejecting claims of the unconstitutionality of section 130.38.

The Court of Appeals (1) affirmed the order of the Appellate Division, and (2) reversed the orders of the Erie County Court and dismissed the informations, holding, in an opinion by Judge Jones, that section 130.38 of the Penal Law violates defendants' constitutional rights to privacy and equal protection of the law because it is broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the proscribed conduct between persons married to each other without sanction.

People v Onofre, 72 AD2d 268, affirmed.

HEADNOTE

Crimes — Sodomy — Consensual Sodomy

Section 130.38 of the Penal Law, which criminalizes consensual sodomy or deviate sexual intercourse between persons not married to each other as defined in subdivision 2 of section 130.00 of the Penal Law, is violative of rights protected by the United States Constitution because the statute is broad enough to reach noncommercial, cloistered personal sexual conduct between consenting adults and because it permits the proscribed conduct between persons married to each other without sanction; section 130.38 violates the rights of defendants convicted thereunder to privacy and to equal protection of the laws.

POINTS OF COUNSEL

Richard A. Hennessy, Jr., District Attorney (*Gail N. Uebelhoer* and *John A. Cirando* of counsel), for appellant in the first above-entitled action. I. The court below erroneously extended the *Griswold* right to privacy to encompass sodomy.

APPENDIX C

Opinion of the New York State Court of Appeals

(Cooper v Morin, 49 NY2d 69; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Griswold v Connecticut*, 381 US 479; *Lovisi v Slayton*, 539 F2d 349, cert den *sub nom. Lovisi v Zahradnick, Penitentiary Supt.*, 429 US 977; *Raphael v Hogan*, 305 F Supp 749; *Matter of Dora P.*, 68 AD2d 719; *People v Rice*, 80 Misc 2d 511, 87 Misc 2d 257, 41 NY2d 1018; *People v Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *Eisenstadt v Baird*, 405 US 438; *Carey v Population Servs., Int.*, 431 US 678.) II. The court below erroneously held that marriage violates equal protection. *(Frontiero v Richardson*, 411 US 677; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Village of Belle Terre v Boraas*, 416 US 1; *Griswold v Connecticut*, 381 US 479; *Frances B. v Mark B.*, 78 Misc 2d 112; *Anonymous v Anonymous*, 67 Misc 2d 982; *Mirizio v Mirizio*, 242 NY 74; *People v Reilly*, 85 Misc 2d 702; *People v. Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *Raphael v Hogan*, 305 F Supp 749.) III. The court below erroneously held that proscriptions against sodomy were an improper exercise of State power. *(People v Dozier*, 72 AD2d 478; *People v Rice*, 41 NY2d 1018; *People v Broadie*, 37 NY2d 100; *Paris Adult Theatre I v Slaton*, 413 US 49; *People v Portanova*, 56 AD2d 265; *People v Billi*, 90 Misc 2d 568.) IV. The statute is constitutional. *(Cooper v Morin*, 49 NY2d 69; *Matter of Dora P.*, 68 AD2d 719; *Raphael v Hogan*, 305 F Supp 749; *People v Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *People v Dozier*, 72 AD2d 478; *People v Broadie*, 37 NY2d 100; *People v Portanova*, 56 AD2d 265; *People v Griswold*, 213 NY 92; *Matter of Trustees of State Univ. of N.Y. v Edelman*, 76 Misc 2d 820.)

Bonnie Strunk for respondent in the first above-entitled action. I. Section 130.38 of the New York Penal Law is an unconstitutional infringement upon repondent's fundamental right to privacy. *(Olmstead v United States*, 277 US 438; *Boyd v United States*, 116 US 616; *Union Pacific Ry. Co. v Botsford*, 141 US 250; *Meyer v Nebraska*, 262 US 390; *Allgeyer v Louisiana*, 165 US 578; *Pierce v Society of Sisters*, 268 US 510; *Prince v*

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Massachusetts, 321 US 158; *Skinner v Oklahoma*, 316 US 535; *Poe v Ullman*, 367 US 497; *Griswold v Connecticut*, 381 US 479.) II. Respondent's right to privacy is protected by the New York State Constitution. *(Oregon v Hass*, 420 US 714; *Cooper v California*, 386 US 58; *Sibron v New York*, 392 US 40; *Cooper v Morin*, 49 NY2d 69; *People v Barber*, 289 NY 378; *Sharrock v Dell Buick-Cadillac*, 45 NY2d 152; *Ives v South Buffalo Ry. Co.*, 201 NY 271; *Matter of Jacobs*, 98 NY 98; *Bertholf v O'Reilly*, 74 NY 509; *People v Leyra*, 302 NY 353.) III. Section 130.38 of the Penal Law violates respondent's right to equal protection under the New York State and United States Constitutions. *(Matter of Patricia A.*, 31 NY2d 83; *New York State Soc. of Med. Masseurs v City of New York*, 74 Misc 2d 573; *Stanley v Georgia*, 394 US 557; *Eisenstadt v Baird*, 405 US 438; *Railway Express v New York*, 336 US 106; *People v Rice*, 80 Misc 2d 511; *Lovisi v Slayton*, 363 F Supp 620; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *McGowan v Maryland*, 366 US 420; *United States Dept. of Agric. v Moreno*, 413 US 528.) IV. Section 130.38 of the Penal Law violates the due process guarantee of the New York and United States Constitutions. *(Matter of Toia v Regan*, 54 AD2d 46, 40 NY2d 837; *Barbier v Connolly*, 113 US 27; *Patterson v Carey*, 41 NY2d 714; *Eisenstadt v Baird*, 405 US 438; *Baker v Carr*, 369 US 186.) V. The consensual sodomy statute does not serve any reasonable or legitimate State interest. *(People v Dozier*, 72 AD2d 478; *People v Billi*, 90 Misc 2d 568; *People v Bunis*, 9 NY2d 1; *Stanley v Georgia*, 394 US 557; *Goldberg v Kelly*, 397 US 254; *Hannah v Larche*, 363 US 420.) VI. Section 130.38 violates the establishment clause of the First Amendment and section 3 of article I of the New York State Constitution. *(Engel v Vitale*, 370 US 421; *Committee for Public Educ. v Nyquist*, 413 US 756; *Epperson v Arkansas*, 393 US 97; *Everson v Board of Educ.*, 330 US 1; *Abington School Dist. v Schempp*, 374 US 203; *McGowan v Maryland*, 366 US 420; *McCollum v Board of Educ.*, 333 US 203;

Serbian Orthodox Diocese v Milivojevich, 426 US 696.) VII. Respondent's challenge to the constitutionality of New York's consensual sodomy law raises substantial Federal questions that were neither resolved or precluded by the Supreme Court's summary affirmance of *Doe v Commonwealth's Attorney.* (*Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Hicks v Miranda*, 422 US 332; *Gibson v Berryhill*, 411 US 564; *Edelman v Jordan*, 415 US 651; *Fusari v Steinberg*, 419 US 379; *Dillenburg v Kramer*, 469 F2d 1222; *Jordan v Gilligan*, 500 F2d 701, 421 US 991; *Fisher v Secretary of U.S. Dept. of Health, Educ. & Welfare*, 522 F2d 493; *Ashwander v Valley Auth.*, 297 US 288; *Abbot Labs. v Gardner*, 387 US 136.)

Bruce V. Bordelon, Shepherd I. Raimi and *Jo-Ann H. Whitehorn* for The Special Committee on Sex and Law of the Association of the Bar of the City of New York, *amicus curiae*, in the first above-entitled action. The court below correctly struck down New York's consensual sodomy statute as violative of all citizens' — heterosexual as well as homosexual — rights of privacy. (*Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Carey v Population Servs. Int.*, 431 US 678; *Stanley v Georgia*, 397 US 557; *Terry v Ohio*, 392 US 1; *Loving v Virginia*, 388 US 1; *Matter of Dora P.*, 68 AD2d 719; *Roberson v Rochester Folding Box Co.*, 171 NY 538.)

Barbara Ellen Handschu for National Committee for Sexual Civil Liberties, *amicus curiae* in the first above-entitled action. I. The right of privacy is involved herein both under the Federal and the State Constitutions. (*Central Sav. Bank in City of N.Y. v City of New York*, 280 NY 9; *Cooper v Morin*, 49 NY2d 69; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Dorsey v Stuyvesant Town Corp.*, 299 NY 512; *Fuentes v Shevin*, 407 US 67; *Fusari v Steinberg*, 419 US 379;

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Griswold v Connecticut, 381 US 479; *Mandel v Bradley*, 432 US 173; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719.) II. Section 130.38 of the Penal Law is an improper invasion of the right of privacy. *(Jacobellis v Ohio*, 378 US 184; *Paris Adult Theater I v Slaton*, 413 US 49; *People v Onofre*, 72 AD2d 268; *People v Rice*, 41 NY2d 1018; *Roe v Wade*, 410 US 113; *Stanley v Georgia*, 394 US 557.)

Thomas B. Stoddard and *Steven R. Shapiro* for New York Civil Liberties Union, *amicus curiae* in the first above-entitled action. I. This court should explicitly recognize a right to privacy under the Constitution of the State of New York. *(Olmstead v United States*, 277 US 438; *Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Carey v Population Servs. Int.*, 431 US 678; *Spahn v Julian Messner, Inc.*, 43 Misc 2d 219, 23 AD2d 216, 18 NY2d 324; *Time, Inc. v Hill*, 385 US 374; *Matter of A & M*, 61 AD2d 426; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *Matter of Fraser v Brown*, 203 NY 136.) II. Private sexual activity between consenting adults should be protected by any right of privacy recognized under the State Constitution and, on that basis, section 130.38 of the Penal Law must be struck down. *(People v Rice*, 41 NY2d 1018; *Katz v United States*, 389 US 347; *Roe v Wade*, 410 US 113.) III. The right to privacy guaranteed by the United States Constitution protects private sexual activity between consenting adults. *(Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Skinner v Oklahoma*, 316 US 535; *Whalen v Roe*, 429 US 589; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Carey v Population Servs. Int.*, 431 US 678; *Stanley v Georgia*, 394 US 557.)

Margot Karle and *Rosalyn H. Richter* for Lambda Legal Defense & Education Fund, Inc., *amicus curiae* in the first above-entitled action. I. The court below correctly held section

130.38 of the Penal Law is unconstitutional as violative of the right to privacy. *(Carey v Population Servs. Int.*, 431 US 678; *Cooper v Morin*, 49 NY2d 69; *Doe v Bolton*, 410 US 179; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Eisenstadt v Baird*, 405 US 438; *Griswold v Connecticut*, 381 US 479; *Lovisi v Slayton*, 539 F2d 349; *Planned Parenthood of Mo. v Danforth*, 428 US 52; *Roe v Wade*, 410 US 113; *Stanley v Georgia*, 394 US 557.) II. The court below correctly held section 130.38 as violative of the equal protection clause. *(Acanfora v Board of Educ.*, 359 F Supp 843, 491 F2d 498, 419 US 836; *Eisenstadt v Baird*, 405 US 438; *Griswold v Connecticut*, 381 US 479; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *Korematsu v United States*, 323 US 214; *Maher v Roe*, 432 US 464; *Mathews v Lucas*, 427 US 495; *Memorial Hosp. v Maricopa County*, 415 US 250; *San Antonio School Dist. v Rodriguez*, 411 US 1.) III. Section 130.38 should be held unconstitutional under the provisions of the New York Constitution irrespective of the interpretation under the Federal Constitution. *(Cooper v Morin*, 49 NY2d 69; *People v Fiedler*, 31 NY2d 176; *People v Isaacson*, 44 NY2d 511; *Sharrock v Del Buick-Cadillac*, 45 NY2d 152; *Wilkinson v Skinner*, 34 NY2d 53.)

William H. Gardner and *Dianne Bennett* for appellants in the second and third above-entitled actions. I. The New York consensual sodomy statute is unconstitutional as an impermissible invasion of privacy. *(People v Onofre*, 72 AD2d 268; *Griswold v Connecticut*, 381 US 479; *Stanley v Georgia*, 394 US 557; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Boyd v United States*, 116 US 616; *Union Pacific Ry. Co. v Botsford*, 141 US 250; *Meyer v Nebraska*, 262 US 390; *Pierce v Society of Sisters*, 268 US 510; *Prince v Massachusetts*, 321 US 158; *Skinner v Oklahoma*, 316 US 535.) II. Appellants have standing to raise the right of privacy in support of their effort to have their convictions set aside. *(People v Rice*, 41 NY2d 1018; *Griswold v Connecticut*, 381 US 479; *Orr v Orr*, 440 US 268.) III. The New

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York consensual sodomy statute is unconstitutional as a violation of the rights to the equal protection of the laws of those who are subject to it, as a result of the distinction made in the statute between married and unmarried persons. *(Griswold v Connecticut,* 381 US 479.) IV. Regardless of the result under the United States Constitution, this court should hold the statute unconstitutional under applicable provisions of the New York Constitution. *(Cooper v Morin,* 49 NY2d 69; *Cohen v Hurley,* 366 US 117; *Oregon v Hass,* 420 US 714; *Sharrock v Del Buick-Cadillac,* 45 NY2d 152; *People v Isaacson,* 44 NY2d 511.) V. The court should strike down the consensual sodomy statute (Penal Law, §130.38) in its entirety. *(Matter of Lyons v Goldstein,* 290 NY 19; *People v Finkelstein,* 9 NY2d 342; *Courtesy Sandwich Shop v Port of N.Y. Auth.,* 12 NY2d 379; *People v Epton,* 19 NY2d 496; *People v Kaiser,* 21 NY2d 86; *Spahn v Julian Messner, Inc.,* 21 NY2d 124; *Matter of Seitz v Drogheo,* 21 NY2d 181; *People v Bailey,* 21 NY2d 588.) VI. Appellants have established that their prosecution is the result of discriminatory enforcement, resulting in a violation of their constitutional right to equal protection of the laws. *(Yick Wo v Hopkins,* 118 US 356; *People v Utica Daw's Drug Co.,* 16 AD2d 12; *People v Friedman,* 302 NY 75; *People v Goodman,* 31 NY2d 262; *Matter of 303 West 42nd St. Corp. v Klein,* 46 NY2d 686; *Matter of Di Maggio v Brown,* 19 NY2d 283; *Snowden v Hughes,* 321 US 1; *Gomillion v Lightfoot,* 364 US 339; *Oyler v Boles,* 368 US 448; *People v Walker,* 14 NY2d 901.)

Edward C. Cosgrove, District Attorney (John J. De Franks of counsel), for respondent in the second and third above-entitled actions. I. The constitutionally recognized right to privacy does not protect acts of consensual sodomy committed by individuals in automobiles parked on public streets. *(Griswold v Connecticut,* 381 US 479; *Poe v Ullman,* 367 US 497; *Stanley v Georgia,* 394 US 557; *Eisenstadt v Baird,* 405 US 438; *Roe v Wade,* 410 US 113; *Skinner v Oklahoma,* 316 US 535; *Doe v Commonwealth's At-*

torney for City of Richmond, 403 F Supp 1199, 425 US 901; *People v Rice,* 41 NY2d 1018.) II. Appellants lack standing to assert a right to privacy in the present cases. III. Section 130.38 of the Penal Law is not violative of the right to equal protection of the law. *(Griswold v Connecticut,* 381 US 479; *People v Rice,* 87 Misc 2d 257; *Raphael v Hogan,* 305 F Supp 749; *Near v Minnesota,* 283 US 697; *Matter of Levy,* 38 NY2d 653.) IV. Section 130.38 of the Penal Law should not be held to be unconstitutional under this State's Constitution. *(Cooper v Morin,* 49 NY2d 69.) V. Even if section 130.38 of the Penal Law is found unconstitutional with respect to private conduct, the statute should be held to be valid with respect to sodomous acts performed in public areas. VI. The trial court properly denied appellant's claim of discriminatory enforcement of the statute in the absence of any evidence to support such a claim. *(Yick Wo v Hopkins,* 118 US 356; *People v Utica Daw's Drug Co.,* 16 AD2d 12; *People v Goodman,* 31 NY2d 262.)

OPINION OF THE COURT

JONES, J.

These appeals, argued together, present a common question — viz., whether the provision of our State's Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution. We hold that it is.

Defendant Onofre was convicted in County Court of Onondaga County of violating section 130.38 of the Penal Law (consensual sodomy) after his admission to having committed acts of deviate sexual intercourse with a 17-year-old male at defendant's home.[1] The factual admission followed the court's denial of defendant's motion to dismiss the indictment on the ground that the statute

[1]Defendant's conviction was not predicated on a guilty plea as inadvertently recited in the opinion at the Appellate Division.

was an invasion of his constitutionality protected right of privacy and that it denied him equal protection of the laws.

Defendants Peoples and Goss were convicted in Buffalo City Court of violating the consensual sodomy statute after a jury trial at which evidence was adduced that they had engaged in an act of oral sodomy in an automobile parked on a street in the City of Buffalo in the early morning hours. Defendant Sweat was convicted of the same crime after a jury trial in the same court on proof that she had committed a similar act with a male in a truck parked on a street in a residential area of the city about 1:30 a.m. In the cases in Buffalo City Court motions by defendants for dismissals of the informations on the ground that section 130.38 of the Penal Law is unconstitutional because it deprives them of equal protection of the law and denies their right of privacy had been denied.

On appeal by defendants from the judgments of conviction the Appellate Division, Fourth Department, reversed in the case of Onofre and dismissed the indictment, concluding that section 130.38 of the Penal Law was unconstitutional and the County Court of Erie County affirmed the convictions of Peoples, Goss and Sweat, rejecting the claims of unconstitutionality. The order of the Appellate Division should be affirmed; those of County Court should be reversed and the informations dismissed.

The statutes under which these defendants were charged and convicted provide as follows:

"§130.38 Consensual sodomy.

"A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

"§130.00 Sex offenses; definitions of terms.

"The following definitions are applicable to this article:

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"2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva."

Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy[2] and the right

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[2]We are not unmindful that both District Attorneys seek to draw support from conduct by defendants which they claim either drew the admitted acts of sodomy into the classification of public, not private, conduct or which constituted a waiver of the right to assert a right of privacy. Because our disposition of these appeals rests also on a denial of equal protection rights we need not pass on the contention by the District Attorney of Erie County that the acts committed by defendants Peoples, Goss and Sweat, occurring in vehicles parked on a street or highway at times when traffic might be expected to be light but which could have been observed by a passerby should one have happened on the vehicles and looked inside, lost any claim to being private acts. (On oral argument counsel for the defendants expressly conceded that the acts took place "in public".) The suggestion by the District Attorney of Onondaga County that because defendant Onofre presumably participated in the taking of photographs of himself while engaging in acts of sodomy and thereafter displayed such photographs to the District Attorney, he was forclosed from asserting a right of privacy fails to distinguish between the two aspects of the right as subsequently discussed. Neither the photographing nor the display of the pictures (which was done only after charges of sodomy in the first degree and sexual abuse had been laid against him) affected the secluded nature of the conduct, which was done in defendant's own home free from any observation by the public, although, conceivably, he may thereby have lost any claim to the secrecy aspect of the right to privacy — an aspect he is not now asserting. No distinction between these two aspects was observed in *Lovisi v Slayton* (363 F Supp 620, affd 539 F2d 349, cert den 429 US 977), the decision which appears to have turned on defendants' failure to keep the photographs in such a way that their children would be denied access to them, which the court regarded as a breach of defendants' responsibility to ensure that the seclusion surrounding their acts was preserved (363 F Supp, p 627).

to equal protection of the laws guaranteed them by the United States Constitution.

As to the right of privacy. At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint — what we referred to in *People v Rice* (41 NY2d 1018, 1019) as "freedom of conduct." (See *Whalen v Roe*, 429 US 589, 598-600.) The right, which has been called "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v United States*, 277 US 438, 478 [BRANDEIS, J., dissenting]), "has been viewed as emanating from the first amendment's guarantee of freedom of association, *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and of speech, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the fourth amendment, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the equal protection clause of the fourteenth amendment, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the ninth amendment, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); the penumbras of the Bill of Rights, *id.*; and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)" (*Lovisi v Slayton*, 363 F Supp 620, 624, affd 539 F2d 349, cert den 429 US 977, *supra*).

As recently as 1976 the Supreme Court took pains in *Carey v Population Servs. Int.* (431 US 678, 684-685) to observe that "the outer limits" of the decision-making aspect of the right of privacy "have not been marked by the Court", noting however

that "among the decisions that an individual may make without unjustified government interference" are personal decisions relating to marriage *(Loving v Virginia,* 388 US 1, 12, *supra),* procreation *(Skinner v Oklahoma,* 316 US 535, 541-542), contraception *(Eisenstadt v Baird,* 405 US 438, 453-454), family relationships *(Prince v Massachusetts,* 321 US 158, 166), child rearing and education *(Pierce v Society of Sisters,* 268 US 510, 535; *Meyer v Nebraska,* 262 US 390, 399), and abortion *(Roe v Wade,* 410 US 113, 154, *supra).*

The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its protection, the People contending that it extends to only two aspects of sexual behavior — marital intimacy (by virtue of the Supreme Court's decision in *Griswold v Connecticut* [381 US 479, *supra*]) and procreative choice (by reason of *Eisenstadt v Baird* [405 US 438, *supra*] and *Roe v Wade* [410 US 113, *supra*]). Such a stance fails however adequately to take into account the decision in *Stanley v Georgia* (394 US 557, *supra)* and the explication of the right of privacy contained in the court's opinion in *Eisenstadt.* In *Stanley* the court found violative of the individual's right to be free from governmental interference in making important, protected decisions a statute which made criminal the possession of obscene matter within the privacy of the defendant's home. Although the material itself was entitled to no protection against government proscription *(Roth v United States,* 354 US 476) the defendant's choice to seek sexual gratification by viewing it and the effectuation of that choice within the bastion of his home, removed from the public eye, was held to be blanketed by the constitutional right of privacy. That the right enunciated in *Griswold v Connecticut* (381 US 479, *supra)* to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters, was not limited to married couples was made clear by the language of the court in *Eisenstadt v Baird* (405 US 438,

453, *supra*): "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557 (1969)." In a footnote appended to the *Stanley* citation the court set out the following quotation from that decision (p 453, n 10):

" '[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

" ' "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.' *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." ' "

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions — such as those made by defendants before us — to seek sexual gratification from what at least once was commonly

regarded as "deviant" conduct,[3] so long as the decisions are voluntarily made by adults in a noncommercial, private setting. Nor is any such basis supplied by the claims advanced by the prosecution — that a prohibition against consensual sodomy will prevent physical harm which might otherwise befall the participants, will uphold public morality and will protect the institution of marriage. Commendable though these objectives clearly are, there is nothing on which to base a conclusion that they are achieved by section 130.38 of the Penal Law. No showing has been made, even in references tendered in the briefs, that physical injury is a common or even occasional consequence of the prohibited conduct, and there has been no demonstration either that this is a danger presently addressed by the statute or was one apprehended at the time the statutory

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[3]We express no view as to any theological, moral or psychological evaluation of consensual sodomy. These are aspects of the issue on which informed, competent authorities and individuals may and do differ. Contrary to the view expressed by the dissent, although on occasion it does serve such ends, it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. Thus, it has been deemed irrelevant by the United States Supreme Court that the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of our community or that the viewing of pornographic materials even within the privacy of one's home would not evoke general approbation (*Eisenstadt v Baird*, 405 US 438, *supra; Stanley v Georgia*, 394 US 557, *supra*). We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advise, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

section was enacted contemporaneously with the adoption of the new Penal Law in 1965. Indeed, the proposed comprehensive penal statute submitted to the Legislature by the Temporary Commission on Revision of the Penal Law and Criminal Code dropped all proscription against private acts of consensual sodomy.[4] That the enactment of section 130.38 of the Penal Law was prompted by something other than fear for the physical safety of participants in consensual sodomy is suggested by the statement contained in the memorandum prepared by the chairman of the Temporary Commission: "It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premises that deletion thereof might ostensibly be construed as legislative approval of deviate conduct" (NY Legis Ann, 1965, pp 51-52).

Any purported justification for the consensual sodomy statute in terms of upholding public morality is belied by the position reflected in the *Eisenstadt* decision in which the court carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home. There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality (see *State v Saunders*, 75 NJ 200, 218-220). So here, the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other

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[4]Notable also is the fact that when the Model Penal Code was adopted by the American Law Institute a subsection which would have made consensual sodomy a misdemeanor (§207.5, subd [4]) was consciously omitted (ABA-ALI Model Penal Code, Proposed Official Draft, §213.2, Status of Section, pp 145-146; Tent Draft No. 4, pp 93, 276).

than restrict individual conduct and impose a concept of private morality chosen by the State.

Finally, the records and the written and oral arguments of the District Attorneys as well are devoid of any support for the statement that a prohibition against consensual sodomy will promote or protect the institution of marriage, venerable and worthy as is that estate. Certainly there is no suggestion that the one is a substitute or alternative for the other nor is any empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside the marital bond.

In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution — areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked.

The assertion in the dissent that validation of the consensual sodomy statute is mandated by our recent decision in *People v*

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Shepard (50 NY2d 640) proceeds from a misconception of our holding in *Shepard*. In that case we upheld the constitutionality of the statutory proscription against the possession of marihuana as applied to possession by an individual in the privacy of his home, noting the existence of a legitimate controversy with respect to whether marihuana is a dangerous substance. The concurring opinion assembled the impressive evidence of the harmfulness which attends the use of marihuana. On such a record we sustained the right of the Legislature to reach the substantive conclusion that the use of marihuana was indeed harmful and accordingly to impose a criminal proscription based on that predicate. There is in the present case no basis for a counterpart to the statement in *Shepard* that "the Legislature, following extensive studies and hearings, has specifically found the drug to be sufficiently harmful to warrant punishing its possession in an effort to deter its use" (p 646). By critical contrast neither the People nor the dissent has cited any authority or evidence for the proposition that the practice of consensual sodomy in private is harmful either to the participants or to society in general; indeed, the dissent's appeal is only to the historical, conventional characterization which attached to the practice of sodomy.[5] It surely does not follow that, because it is constitutionally permissible to enter the privacy of an individual's home to regulate conduct justifiably found to be harmful to him, the Legislature may also intrude on such privacy to regulate individual conduct where no basis has been shown for concluding that the conduct is harmful.

As to the denial of defendant's right to equal protection. Section 130.38 of the Penal Law on its face discriminates be-

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[5]Twenty-two States have now decriminalized consensual sodomy between adults in private (Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings LJ 799, 950-951; NJ Stats Ann, §2C:98-2).

tween married and unmarried persons, making criminal when done by the latter what is innocent when done by the former. With that distinction drawn, we look to see whether there is, as a minimum, "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute *(Eisenstadt v Baird*, 405 US 438, 447, *supra)*.[6] In our view, none has been demonstrated or identified by the People in any of the cases before us. In fact, the only justifications suggested are a societal interest in protecting and nurturing the institution of marriage and what are termed "rights accorded married persons". As has been indicated, however, no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage. Nor is there any suggestion how consensual sodomy relates to rights accorded married persons; certainly it is not evident how it adversely affects any such rights. Thus, even if it be assumed that the objectives tendered by the prosecution are legitimate matters of public concern, no relationship — much less rational relationship — between those objectives and the proscription of section 130.38 of the Penal Law is manifested. The statute therefore must fall as violative of the right to equal protection enjoyed by persons not married to each other.

Little more need be said to dispose of the contention made by the District Attorneys that the statute is a valid exercise of the police power vested in the State, which power, it is asserted, is

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[6]If we are correct in the view earlier expressed in this opinion that section 130.38 of the Penal Law infringes on defendants' right of privacy which is a fundamental right, then, as observed, in *Eisenstadt*, the statutory classification "would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest" (405 US, p 447, n 7). As was so in *Eisenstadt*, however, we do not need to measure the statute by that test inasmuch as it fails to satisfy even the more lenient rational basis standard.

authorized for the prevention of harm or for the preservation of public morality. No substantial prospect of harm from consensual sodomy nor any threat to public — as opposed to private — morality has been shown.

Finally, we do not plow new ground in the result we reach today. Most recently, the Supreme Court of Pennsylvania, for some of the same reasons that underlie our decision, has reached a similar conclusion even in a case in which the defendants were charged with commission of deviant acts of sexual conduct with members of the audience at performances in a public theatre for which an admission fee had been charged (*Commonwealth v Bonadio*, ____ Pa ____, 415 A2d 47 [Pa]). Also consistent with the result we reach are the decisions by the Iowa Supreme Court in *State v Pilcher* (242 NW2d 348 [Iowa]) and by the New Jersey Superior Court in *State v Ciuffini* (164 NJ Super 145), relying on the earlier case of *State v Saunders* (75 NJ 200, *supra*) in which its Supreme Court had invalidated as contrary to the constitutionally protected right of privacy a statute making fornication a criminal offense. Nor is any contrary result compelled by *Doe v Commonwealth's Attorney for City of Richmond* (403 F Supp 1199, affd 425 US 901), a civil action in which prayers for a declaratory judgment invalidating and an injunction precluding prosecution under a Virginia sodomy statute, which expressly included consensual sodomy, were denied. Although the District Court in its opinion addressed the constitutionality of the statute and concluded that it was not invalid, its disposition included no declaration of constitutionality, but merely denied the relief requested and dismissed the complaint. A summary affirmance of the dismissal without declaration followed in the United States Supreme Court. In that circumstance the disposition by the Supreme Court does not necessarily signify approval of the reasoning by which the lower court resolved the case (*Fusari v Steinberg*, 419 US 379, 391 [concurring opn by BURGER, Ch.J.]). Apart from the limited precedential value of

summary affirmance (see e.g., *Edelman v Jordan*, 415 US 651, 671; Hart & Wechsler, Federal Courts and the Federal System [1977 Supp], at p 112, n 1) in *Doe* there was lacking any evidence of threatened prosecution of the plaintiffs under the Virginia statute — a factor arguably relevant to their standing to maintain the action (cf. *O'Shea v Littleton*, 414 US 488). Thus, the affirmance by the Supreme Court of the District Court's dismissal of the action may have been predicated on a lack of standing on the part of plaintiffs. Subsequent to the decision of the *Doe* case a member of that court stated that the court had not yet "definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior (private consensual sexual behavior) among adults" (*Carey v Population Servs. Int.*, 431 US 678, 694, n 17 [opn by BRENNAN, J., concurred in by a plurality], *supra*).

That difficult question, to the extent that it is posed by these appeals, is before us now. For the reasons given above, we conclude that the imposition of criminal sanctions such as those contained in section 130.38 of the Penal Law is proscribed by the Constitution of the United States.

Accordingly, on the appeal by the District Attorney of Onondaga County the order of the Appellate Division should be affirmed. On the appeals by defendants Peoples, Goss and Sweat the orders of the Erie County Court should be reversed, the convictions vacated and the informations dismissed.

JASEN, J. (concurring in result). While I cannot accept the majority's premise that the so-called "penumbral" right to privacy which first appeared in *Griswold v Connecticut* (381 US 479) should be extended to encompass and protect any and all types of consensual sexual behavior in private, I nonetheless concur in result herein for I can discern no rational basis upon which the Legislature could have decided to freely allow the conduct in issue among married people and to make identical

conduct criminal among those for whom that estate is undesirable or unattainable.

I hasten to add that, in my opinion, the Legislature does have the power to make moral judgments. However, that legislative power is, as all others are, limited by the supervening requirement that it be exercised with the requisite evenhandedness. Here, it was not.

GABRIELLI, J. (dissenting). Without making any effort to define its boundaries or limitations, a majority of my colleagues has recognized for the first time a constitutional right of personal autonomy broad enough to encompass at least the freedom to indulge in those sexual practices which have long been proscribed by our criminal law. Although the majority has attempted to associate this "fundamental right" with the recent Supreme Court decisions creating a "zone of privacy" to protect certain familial decisions, it is apparent that the connection between this case and those decisions exists only on the most superficial level and that the right of sexual choice established today is really a wholly new legal concept bearing little resemblance to the familiar principles enunciated in *Griswold v Connecticut* (381 US 479) and its progeny. Because I cannot concur in the substance of the majority's conclusion and because I am concerned with the majority's failure to articulate an analytical framework for resolving future claims under this amorphous concept of personal autonomy, I am compelled to cast my vote in dissent.

I begin with the premise that none of the cases relied upon by the majority stand for the proposition that there is a generalized right of privacy or personal autonomy implicit in the Federal Bill of Rights. Nor do the cases cited in the majority opinion provide support for the idea that the courts may invoke the due process clause of the Fourteenth Amendment as a predicate for striking down penal provisions which some members of the

judiciary may find distasteful or inconsistent with their own notions of fundamental fairness. Indeed, were that not the case, we could not have held as we recently did in *People v Shepard* (50 NY2d 640) that the statutory ban on the private possession of marihuana (see Penal Law, §220.03) is not an unconstitutional infringement of the right of an individual to do as he pleases in his own home. To the contrary, had we concluded in *Shepard* as the majority seems to have concluded in this case that the freedom to choose one's own form of sensory gratification within the confines of one's own home is a constitutionally protected "fundamental" right, we could not have sustained the statute at issue in that case on the basis of mere "rationality," but would instead have been duty bound to conduct a more searching inquiry to determine whether the State's interest in the legislative ban was truly "compelling" (see e.g., *Roe v Wade*, 410 US 113; *Shapiro v Thompson*, 394 US 618; *Griswold v Connecticut*, 381 US 479, *supra*).

Arguing that the People have failed to demonstrate that individuals who engage in consensual acts of sodomy are likely to suffer any serious physical side effects, the majority has attempted to distinguish the statutory prohibition at issue in *Shepard* from that at issue in this case by stressing that the ban which we upheld in *Shepard* was justified by a rational legislative finding that marihuana use can be physically harmful (pp 490-491). This assertion, however, represents a seriously flawed understanding of the inquiry that must be pursued in identifying such rights.

In order to determine whether the freedom to engage in a particular activity is a constitutionally protected "fundamental right," we must look directly to the specific guarantees outlined in the body of the Constitution and the Bill of Rights and to the "penumbras, formed by emanations from those guarant[ees]" (*Griswold v Connecticut*, 381 US 479, 484, *supra*). The nature and extent of the State's interest in regulating or proscribing the

activity in question are simply not relevant considerations at this stage of the inquiry. Indeed, it is only after the court makes a threshold determination as to whether a particular State regulation impinges upon a "fundamental right" that such considerations are brought into play. If it is determined, for example, that a "fundamental right" is being impaired, the regulation at issue cannot be sustained unless it is narrowly tailored to effectuate some "compelling" governmental interest, such as the State's interest in protecting the health of its citizens (see *Roe v Wade*, 410 US 113, *supra*; *Shapiro v Thompson*, 394 US 618, *supra*). On the other hand, once it is established that no "fundamental rights" are at issue, the court may uphold the State enactment if it is merely rationally related to some legitimate governmental purpose which falls within the State's broad police powers (e.g., *People v Shepard*, 50 NY2d 640, *supra*). By suggesting that the activity proscribed in this case involves a "fundamental right" simply because it entails no significant danger to health, the majority has created a truly circular constitutional theory and has, in effect, injected an additional level of confusion into this already rather murky area of the law.

Under the analysis utilized by the majority, *all* private, consensual conduct would necessarily involve the exercise of a constitutionally protected "fundamental right" unless the conduct in question jeopardizes the physical health of the participant. In effect, the majority has held that a State statute regulating private conduct will not pass constitutional muster if it is not designed to prevent physical harm to the individual. Such an analysis, however, can only be based upon an unnecessarily restrictive view of the scope of the State's power to regulate the conduct of its citizens. In my view, the so-called "police powers" of the State must include the right of the State to regulate the moral conduct of its citizens and "to maintain a decent society" (*Jacobellis v Ohio*, 378 US 184, 199, quoted in *Paris Adult Theatre I v Slaton*, 413 US 49, 59-60). Indeed,

without mentioning specific provisions, it is apparent that our State's penal code represents, in part, an expression of our society's collective view as to what is or is not morally acceptable conduct. And, although the Legislature may not exercise this power in a manner that would impair a constitutionally protected "fundamental right," it begs the question to suggest, as the majority has, that such a right is necessarily involved whenever the State seeks to regulate conduct pursuant only to its interest in the moral well-being of its citizenry.

We may avoid the circularity in the majority's reasoning in cases such as this only if we utilize a two-tiered approach, taking care to ascertain at the outset whether a "fundamental right" is actually implicated without regard to the nature of the governmental interest involved in the challenged statute. If no such right is found to exist, we must refrain from interfering with the choice made by the Legislature and rest content upon the assurance that when the challenged statute is no longer palatable to the moral sensibilities of a majority of our State's citizens, it will simply be repealed.

Although our decision to sustain the statute challenged in *Shepard* under settled principles of judicial restraint would seem dispositive of the issue in this case, the majority has nonetheless adopted a contrary view and has placed the claim of personal autonomy asserted by defendants in the category of those ill-defined fundamental rights which are protected by the "penumbras" emanating from the Bill of Rights (*Griswold v Connecticut, supra,* at pp 484-485) and by the concept of ordered liberty implicit in the due process clause of the Fourteenth Amendment (*Roe v Wade, supra,* at pp 152-153). I cannot agree, however, that the right of an individual to select his own form of sexual gratification should stand on any better footing than does the right of an individual to choose his own brand of intoxicant without governmental interference. Admittedly, the issue in this

case is superficially distinguishable from the issue in *Shepard*, in that here we are concerned with a claim involving freedom of sexual expression, and it is therefore tempting to equate the "right" asserted by defendants with other well-established sexually related rights such as the right of an individual to obtain contraceptives (*Griswold v Connecticut, supra*), the right of a woman to terminate an unwanted pregnancy (*Roe v Wade, supra;* see *Doe v Bolton*, 410 US 179) and the right of a citizen to consume printed pornographic material in the privacy of his own home (*Stanley v Georgia*, 394 US 557). But the decisions in *Griswold, Roe* and *Stanley* cannot fairly be interpreted as collectively establishing an undifferentiated right to unfettered sexual expression (see Note, Constitutionality of Sodomy Statutes, 45 Fordham L Rev 553, 575). Consequently, the majority's effort to justify its holding today as a mere extension of these decisions is, in the final analysis, entirely unconvincing.

The "fundamental" rights recognized in *Griswold, Roe* and their progeny are clearly not a product of a belief on the part of the Supreme Court that modern values and changing standards of morality should be incorporated wholesale into the due process clause of the Fourteenth Amendment. To the contrary, the language of the Supreme Court decisions makes clear that the rights which have so far been recognized as part of our due process guarantee are those rights to make certain familial decisions which have been considered sacrosanct and immune from governmental intrusion throughout the history of western civilization. The point has been aptly made by Justice HARLAN in his oft-quoted dissent in *Poe v Ullman* (367 US 497, 553, quoted in *Griswold v Connecticut*, 381 US 479, *supra*, at p 499 [GOLDBERG, J., concurring]): "Adultery, homosexuality and the like are sexual intimacies which this State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in

every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." Justice DOUGLAS also made clear the nature of the "right of privacy" that was being protected when he stated in *Griswold v Connecticut* (*supra*, at p 486): "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system * * * It is an association that promotes a way of life."

This is not to suggest that the Federal Constitution protects only those sexually related decisions that are made within the context of the marital relationship. As the majority notes, such a conclusion was effectively foreclosed when the Supreme Court stated in *Eisenstadt v Baird* (405 US 438, 453, *supra*): "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (emphasis in original).

Nevertheless, contrary to the position taken by the majority, I cannot agree that this language foreshadows a recognition by the Supreme Court of a generalized right to complete sexual freedom for all adults, whether married or single. Instead, as is suggested by the careful wording of the quoted paragraph, I would conclude that *Eisenstadt* stands only for the narrower proposition that the ancient and "fundamental" right of an individual to decide "whether to bear or beget a child" cannot be limited to married

adults (accord Hindes, Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process, 126 U of Pa L Rev 344, 361-362).[1] Under this view, *Eisenstadt* may be regarded as a simple extension of a long line of cases protecting "freedom of personal choice in matters of marriage *and family life*" (*Roe v Wade*, 410 US 113, 169, *supra* [STEWART, J., concurring; emphasis supplied]; see *Loving v Virginia*, 388 US 1 [personal decisions relating to marriage]; *Prince v Massachusetts*, 321 US 158 [decisions relating to family relationships]; *Skinner v Oklahoma*, 316 US 535 [decisions relating to procreation]; *Pierce v Society of Sisters*, 268 US 510; *Meyer v Nebraska*, 262 US 390 [decisions relating to childbearing and education]). Indeed, even the highly controversial decision in *Roe v Wade (supra)* holding the freedom of women to obtain abortions to be a constitutionally protected right may be regarded as part of the continuum of cases that bring within the ambit of the due process clause those familial decisions that historically have enjoyed immunity from governmental regulation. As the *Roe* court was careful to point out: "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent

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[1] I find additional support for my interpretation of the *Eisenstadt* opinion in subsequent pronouncements by the Supreme Court. In *Paris Adult Theatre I v Slaton* (413 US 49, 68), for example, the court squarely rejected the argument that "conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection". In response to this contention, the court observed: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take" (footnotes omitted).

Similarly, in *Roe v Wade* (410 US 113, 154), the Supreme Court refused to accept the contention that "the claim * * * that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions". The *Roe* court flatly stated that "[t]he Court has refused to recognize an unlimited right of this kind in the past".

vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century" (410 US 113, 129, *supra*).

The majority impliedly recognizes that the Supreme Court has to date limited the protection of the Constitution to decisions relating to the traditionally protected areas of family life, marital intimacy and procreation. Yet the majority has also concluded that there exists "no rational basis * * * for excluding from the same protection decisions * * * to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct" (p 488). I must disagree, however, because my reading of the recent Supreme Court cases leads me to the conclusion that the distinction repeatedly drawn in those cases between freedom of choice in the historically insulated areas of procreation, family life and marital relationships on the one hand and the general freedom of unfettered sexual choice on the other is more than just a temporary or artificial one.[2]

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[2]While the majority has placed great reliance upon the decision of the Supreme Court in *Stanley v Georgia* (394 US 557) as support for the proposition that the Bill of Rights encompasses a general right of privacy and personal autonomy, that decision, in my view, is not susceptible of such an expansive reading (compare *Paris Adult Theatre I v Slaton*, 413 US 49). In *Stanley*, the court struck down a State statute that penalized the private possession of printed pornographic material in the home. Although the *Stanley* court acknowledged that the obsene materials themselves would not ordinarily be covered by the protection of the First Amendment (see *Roth v United States*, 354 US 476), it made clear that its decision to invalidate the challenged legislation was based in large measure upon the individual's First Amendment "right to receive information and ideas, regardless of their social worth" (394 US, at p 564). Indeed, in a significant passage of its opinion, the *Stanley* court stated: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own

Footnote continued on next page—

APPENDIX C
Opinion of the New York State Court of Appeals

The assertion that the theories espoused in *Griswold, Roe* and their progeny may be likened to the discredited doctrine of "substantive due process" (see, e.g., *Coppage v Kansas*, 236 US 1; *Lochner v New York*, 198 US 45; *Allgeyer v Louisiana*, 165 US 578; see, generally, Tribe, American Constitutional Law, §§8-1 through 8-7) would not come as a surprise to any serious constitutional scholar. Many have made the observation that the modern notion of "fundamental rights" bears a striking resemblance to the *Lochner* doctrine under which State economic and social regulations were routinely struck down as violative of certain basic, substantive freedoms that were thought to inhere in the due process clauses of the Fifth and Fourteenth Amendments (see, e.g., *Roe v Wade*, 410 US 113, 167-171 [STEWART, J., concurring], 171-178 [REHNQUIST, J., dissenting], *supra; Griswold v Connecticut*, 381 US 479, 514-527 [BLACK, J. dissenting], *supra;* Tribe, American Constitutional Law, §15-2; Craven, Personhood: The Right to Be Let Alone, 1976 Duke LJ 699, 712-713; Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 S Ct Rev 159). The *Lochner* doctrine was ultimately rejected by the Supreme Court, in part because it had placed the court in the position of a "superlegislature" enabling it to use the "vague contours" of the due process clause as a vehicle for striking down State legislation which it found to be inconsistent with its own contemporary views of natural law *(Ferguson v Skrupa*, 372 US 726; accord *Williamson v Lee Opt. Co.*, 348 US 483, 488; *Day-Brite Light. v*

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house, what books he may read or what films he may watch" (*id.*, at p 565). The so-called "privacy right" recognized in *Stanley* may thus be regarded as a simple extension of the First Amendment guarantee against governmental interference with the transmission of ideas. That the "privacy right" articulated in *Stanley* does not extend beyond the "right to receive information" and into the claimed right to receive "sensations", whether sexually or chemically induced, was reaffirmed in our recent decision in *People v Shepard* (50 NY2d 640, *supra*).

Missouri, 342 US 421, 423). Indeed, inherent in the *Lochner* doctrine was the very real danger that a countermajoritarian institution such as the court would impose upon the elected officials of State government its *ad hoc* notions regarding the substantive content of the term "liberty" and would place restrictions upon the States' power to govern over and above those mandated by the specific provisions contained in the body of the Constitution and the Bill of Rights. It was out of a recognition of this danger that the rule of judicial restraint and minimal judicial scrutiny of State legislation was born (see Tribe, American Constitutional Law, §8-7).

In the wake of *Griswold* and *Roe*, it is no longer an intellectually defensible position to suggest that the once discredited doctrine of "substantive due process" is entirely dead and buried. On the other hand, it is far from clear that those two cases heralded a unqualified return to the days when a Judge acted as "a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness" (Cardozo, Selected Writings, Nature of the Judicial Process, at p 164, quoted in *People v Shepard*, 50 NY2d 640, 646, *supra*). As the language of those decisions and their forerunners indicates, the "fundamental" rights so far recognized by the Supreme Court under the modern version of "substantive due process" have been strictly limited to those that may be traced to matters that were traditionally insulated from governmental intrusion. In my view, it is precisely this limitation that differentiates the relatively recent "fundamental right" concept from the long discarded and truly pernicious doctrine enunciated in *Lochner v New York (supra)*.

To suggest, as the majority does, that the concept of "fundamental rights" should be expanded to include a generalized right to sexual gratification in whatever form would be, in effect, to bring the law of "substantive due process" full circle by eliminating all of its present salutary limitations and restoring it to its former status as a vehicle for lawmaking by judicial fiat.

APPENDIX C

Opinion of the New York State Court of Appeals

The majority acknowledges in passing that the sexual choice the defendants now assert as a matter of constitutional right was once regarded as " 'deviant' conduct" (p 488), but it erroneously ascribes no legal significance to that fact, relegating it instead to an irrelevant phenomenon of theology and privately held moral beliefs. This rather glib refusal to take account of the historical treatment of consensual sodomy as criminally punishable conduct has left a gaping hole in the majority's analysis.

In contrast to decisions relating to family life, matrimony and procreation, decisions involving pure sexual gratification have been subject to State intervention throughout the history of western civilization (see *Griswold v Connecticut*, 381 US 479, 505, *supra* [WHITE, J., concurring]; *Poe v Ullman*, 367 US 497, 533, *supra* [HARLAN, J., dissenting]; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, affd 425 US 901; *Dawson v Vance*, 329 F Supp 1320, 1322; *State v Bateman*, 25 Ariz App 1, 4, revd in part 113 Ariz 107 [en banc]). Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of rape (43 Aquinas, Summa Theologiae, pp 246-249 [Gilby ed]; 4 Blackstone's commentaries *215; see, generally, Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L Rev 1281, 1292-1298). Indeed, as early as 1553 during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various States. Thus, although some may take offense at the persistence of the proscriptions against consensual sodomy in our modern law, the fact remains that western man has never been free to pursue his own choice of sexual gratification without fear of State interference. Consequently, it simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clauses of the Fifth and Fourteenth Amendments.

APPENDIX C
Opinion of the New York State Court of Appeals

In view of the continuous and unbroken history of anti-sodomy laws in the United States, the majority's decision to strike down New York's statute prohibiting consensual sodomy can only be regarded as an act of judicial legislation creating a "fundamental right" where none has heretofore existed. As such, today's decision represents a radical departure from cases such as *Griswold* and *Roe*, in which the Supreme Court merely swept aside State laws which impaired or prohibited entirely the free exercise of rights that traditionally had been recognized in western thought as being beyond the reach of government. I cannot concur in the majority's conclusion.[3] As Justice BLACK once observed, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional

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[3]Without intending to sound a general alarm, I cannot help but wonder what the limits of the majority's new doctrine of "personal autonomy" might be. If, for example, the freedom of an individual to engage in acts of consensual sodomy is truly a "fundamental right", it would seem fairly clear that, absent a "compelling state interest", the State cannot impose a burden upon the free exercise of that right by limiting the individual's access to government jobs (cf. *Shapiro v Thompson*, 394 US 618). Moreover, if the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution and homosexual marriage. I very much regret that the majority has failed in its discussion of the "fundamental right" to personal autonomy to set forth some analytical framework for resolving difficult questions such as these.

provision" (*Griswold v Connecticut*, 381 US 479, 510, *supra* [BLACK, J., dissenting]).[4]

Accordingly, I cast my vote to reverse the order of the Appellate Division in People v Onofre and to affirm the respective orders of the County Court in People v Peoples, People v Goss and People v Sweat.

Judges WACHTLER, FUCHSBERG and MEYER concur with Judge JONES; Judge JASEN concurs in result in a separate opinion; Judge GABRIELLI dissents and votes to reverse in another opinion in which Chief Judge COOKE concurs.

In *People v Onofre:* Order affirmed.

Judges WACHTLER, FUCHSBERG and MEYER concur with Judge JONES; Judge JASEN concurs in result in a separate opinion; Judge GABRIELLI dissents and votes to affirm in another opinion in which Chief Judge COOKE concurs.

In *People v Peoples* and *Goss* and *People v Sweat:* Orders reversed, convictions vacated and informations dismissed.

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[4]Inasmuch as I conclude that there is no "fundamental right" to sexual gratification, I must also consider whether section 130.38 of the Penal Law represents an irrational classification on the basis of marital status in violation of the equal protection clause of the Fourteenth Amendment. Since marital status has never been recognized as a "suspect classification" (compare Executive Law §296), the legislative distinction between marrieds and unmarrieds may stand if it bears some rational relation to a legitimate governmental interest.

Unlike my colleagues in the majority, I have no trouble concluding that the legislature decision to permit married individuals to engage in conduct that is forbidden to the unmarried is rationally based. While the State may prefer that none of its citizens engage in the proscribed forms of sexual gratification, it may properly limit its statutory prohibition to those that are unmarried on the theory that the institution of marriage is so important to our society that even offensive intimacies between married individuals should be tolerated. The statute at issue in this case is thus distinguishable from the statute at issue in *Eisenstadt v Baird* (405 US 438), where the Supreme Court concluded that a ban on the sale of contraceptives to unmarrieds only had no relation to any legitimate government interest.

APPENDIX D
ORDER OF THE NEW YORK STATE COURT OF APPEALS (REMITTITUR)

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 482

The People &c.,

Appellant,

v.

Ronald Onofre,

Respondent.

The appellant in the above entitled appeal appeared by Richard A. Hennessy, Jr., District Attorney, Onondaga County; the respondent appeared by Seidenberg and Strunk.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Jones, J. All concur, Jasen, J., in result in a separate opinion; except Gabrielli, J., who dissents and votes to reverse in an opinion in which Cooke, Ch.J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Onondaga County Court, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 18, 1980.

Filed & Entered Jan. 5, 3:49 PM '81

APPENDIX E
ORDER OF THE NEW YORK STATE COURT OF APPEALS (DENYING REARGUMENT)

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of February A.D., 1981.

PRESENT, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

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4 Mo. No. 96
The People &c.,

Respondent,

vs.

Ronald Onofre,

Appellant,

INDEX #77/405

A motion for reargument &c. in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court